No. 364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,

VS.

THE CITY OF SEATTLE, a municipal corporation, and HARRY W. CARROLL, as Comptroller of the City of Seattle,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

The question presented for determination here is whether the Supreme Court of the State of Washington erred in deciding that the term "gross income" as defined in Seattle Ordinance No. 62662 was not so vague, indefinite or uncertain as to deny appellant due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

SUMMARY OF ARGUMENT

(A) The word "value" means gross, not net, receipts arising or accruing from the sale of appellant's service treated as a commodity. The price (rates, tolls and charges fixed by law) received is the "value" received. "Value" means gross receipts since ex-

press provisions allow no deductions for cost of service.

Moreover, appellant's gross receipts are comprehended within the terms "rentals, royalties. fees or other emoluments, however designated."

(B) Since appellant's gross receipts are otherwise covered in the definition, it may not be heard to complain of the phrase "receipts by reason of the investment of capital". The phrase is not indefinite.

(C) Since all of appellant's receipts accrue from the sale of its service, it obtains no receipts from the *use* as such of its real property. Any indefiniteness in the clause "excluding receipts or proceeds from the *use* * * * of real property" is, therefore, not before the Court. If material, however, and unconstitutionally indefinite, the clause may be disregarded.

(D) The penalty provisions apply only to intentional wrong. In any event, these provisions should not render the tax provisions of the ordinance void.

(E) General Obesrvations. Exemplification of judicially approved words and phrases of more or less indefinite import.

ARGUMENT

Under the provisions of Ordinance No. 62662 of the City of Seattle appearing in the Record herein at page 14 and in the Appendix to appellant's brief, the appellant is taxed as follows:

> "Section 3. *'Occupation License' Required*: After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License'. * * *."
>
> "Section 5. *Occupations Subject to Tax—Amount*: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:
>
> (a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent. (4%) of the total gross income from such business in the City duing his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1000.00) Dollars per tax year. * * *."
>
> "Section 2. *Definitions*: In construing the provisions of this ordinance, save when other-

wise plainly declared or clearly apparent from the context, the following definitions shall be applied:

"GROSS INCOME: The value proceeding or accuring from the sale of tangible property or service, and receipts, (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses. * * *."

"Section 9. *Exceptions and Deductions*: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services. * * *."

"Gross income" as above delimited was borrowed

with some change from Section 959, West Virginia Code, 1932. The act in which it appears has been in force there for several years, and has twice been before this Court.

Hope Natural Gas Co. v. Hall, 102 W. Va. 272, 274 U. S. 284 (Upholding tax on gross income of a natural gas company);
United Fuel Gas Co. v. Hallanan, 87 W. Va. 396, 257 U. S. 277.

In neither case was the definition criticized or an issue.

Substantially similar definitions appear in The Emergency Revenue Act of Mississippi, 1932 (Miss. Code, 1933 Sup., p. 497) and in the Washington Occupation Tax (Session Laws, 1933, Ch. 191, Sec. 1, Subd. (6)).

The appellant points out three parts of the definition in question which it deems so vague and meaningless as to be incapable of application with the claimed precision required by the Constitution. It asserts that (A) the word "value" in the clause "value proceeding or accruing from the sale of tangible property or service" is indefinite and vague; (B) that it is impossible to segregate "receipts by reason of the investment of capital" in its business from receipts arising from skill and management exercised in its business; and (C) that it is impossible to ascertain the amount or proportion of its "receipts or proceeds from the *use* of" its real property, located both in and out of the City, for the purpose of excluding such receipts or proceeds from its "receipts by reason of the investment of capital".

Of course, these criticisms were conceived in partisanship, destructively critical, and separated by a wide chasm from the constructive judicial approach to legislation on trial upon charges of constitutional infraction. This Court long ago said:

> "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."
>
> *Hooper v. California* (1895) 155 U. S. 648, 657, 39 L. ed. 297, 301.

This juridical attitude is especially appropriate and proper when, as here, legislative definition is dissected for destructive ends. Any definition, concisely stated, is at best only the appoximation in expression of a concept. "Definition, simple, positive, hard and fast as it is, never tells the whole truth about a conception," says Josiah Royce. The history of the Federal income tax law is strewn with taxpayer's, departmental, and judicial efforts to ascertain the practical consequences of the Congressional definition of "gross income" appearing in that law (U. S. C. A., Title 26, §954). Among many, we refer to a few instances:

Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372;

So. Pac. Co. v. Lowe, 247 U. S. 330, 62 L. ed. 1142;

Peabody v. Eisner, 247 U. S. 347, 62 L. ed. 1152;

Lynch v. Hornby, 247 U. S. 339, 62 L. ed. 1149;

Gould v. Gould, 245 U. S. 151, 62 L. ed. 211.

The definition in issue here was approved by the Washington Court without construction, conceivably because "the province of construction lies wholly within the domain of ambiguity." *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. ed. 219. If, notwithstanding the Washington Court, it is thought that construction is necessary, it will be accomplished along lines previously marked out by this Court: (1) In the absence of any construction by the State Court, this Court will, if possible, construe State legislation so that it harmonizes with the Constitution, and will resolve doubts in favor of constitutionality. (2) This tribunal will not declare such legislation void at the instance of one not adversely affected. (3) A statute will not be held void for uncertainty if any practical, sensible or reasonable construction can be given it.

In the absence of applicable state decisions, this tribunal will be guided by generally accepted principles of construction which have been recognized and acted upon by it.

> *Pacific Company v. Johnson*, 285 U. S. 480, 489, 76 L. ed. 893, 896.

> (1) "If the state court has not otherwise construed it, and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of, and not against, the state."
>
> *Toombs v. Citizens Bank*, 281 U. S. 643, 647, 74 L. ed. 1088, 1090.

If a statute is susceptible to two constructions, one of which will render it constitutional and the

other unconstitutional, it is the duty of the court to adopt that construction which without doing violence to the fair meaning of the language, will render it valid.

Plymouth Coal Co. v. Pa., 232 U. S. 531, 546; 58 L. ed. 713, 720;

The Abby Dodge, 223 U. S. 166, 175, 56 L. ed. 390; 393.

"So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed (*United States ex rel. Atty. Gen. v. Delaware & H. Co.*, 213 U. S. 366, 407, 408, 53 L. ed. 836, 848, 849, 29 Sup. Ct. Rep. 527); and it is to be presumed that state laws will be construed in that way by the state courts."

Fox v. Washington, 236 U. S. 273, 277, 59 L. ed. 573, 575.

(2) The constitutionality of statutes may be challenged only by one adversely affected and only to the extent to which he is so affected.

A litigant can not invoke a constitutional objection to a part of a statute not applicable to his own particular case.

Southern R. Co. v. King, 217 U. S. 524; 54 L. ed. 868;

Engel v. O'Malley, 219 U. S. 128; 55 L. ed. 128;

Standard Stock Food Co. v. Wright, 225 U. S. 540; 56 L. ed. 1197;

Rosenthall v. People, 226 U. S. 260; 57 L. ed. 212;

Darnell v. Indiana, 226 U. S. 390; 57 L. ed. 267.

Unless a litigant's rights are directly involved, the Court will postpone inquiry into constitutional questions which are separable therefrom until they are met upon a question directly at issue unless the unconstitional feature of it, if it exists, is of such a character as to render the entire act void.

New York C. & H. R. R. Co. v. U. S., 212 U. S. 481; 53 L. ed. 613.

"A law can not be declared invalid at the instance of one not affected by it."

Williams v. Walsh, 222 U. S. 415, 423, 56 L. ed. 253, 256.

The objection that a statute is too vague to be valid is available only to one whom it concerns.

U. S. v. Wurzbach, 280 U. S. 396, 74 L. ed. 508.

"In assailing the constitutionality of a state statute, the burden rests upon appellant to establish that it infringes the constitutional guaranty which he invokes."

Toombs v. Citizens Bank, supra.

"A litigant can be heard to question a statute's validity only when, and so far as, it is being, or is about to be applied to his disadvantage."

Utah Pr. & Light Co. v. Pfost, 286 U. S. 165, 186, 76 L. ed. 1038, 1049.

(3) A statute can not be held void for uncertainty if any practical or sensible or reasonable construction can be given it. Mere difficulty in ascertaining its

meaning or the fact that it is susceptible to interpretation will not render it nugatory. Mere difficulty in construction does not justify courts in disregarding it, and it is their duty to endeavor by every rule of construction to ascertain the meaning of, and give full force and effect to, every enactment of the legislature not obnoxious to constitutional prohibitions.

Fox v. Washington, 236 U. S. 273, 277, 59 L. ed. 573, 575;

State ex rel. Crow v. Westside R. Co., 146 Mo. 155, 47 S. W. 959;

Adams v. Greene, 182 Ky. 504, 206 S. W. 759;

State v. Livingston Concrete B. & M. Co., 34 Mont. 570, 87 Pac. 980;

State ex rel. Forchheimer v. LeBlond, 108 Ohio St. 41, 140 N. E. 491;

State v. Dvoracek, 140 Ia. 266, 118 N. W. 399;

Coggins v. Ely, 23 Ariz. 155, 202 Pac. 391;

Pacific Coast Dairy v. Police Ct. of San Francisco, 214 Cal. 668, 8 Pac. (2d) 140, 80 A. L. R. 1217.

Courts may resolve to clearness a vague statute imposing a tax.

Southeastern Exp. Co. v. Miller, 264 U. S. 535, 539, 68 L. ed. 836, 839.

"Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress

public wrong and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects."

Cliquot v. U. S., 3 Wall. (70 U. S.) 114, 145, 18 L. ed. 116, 121;

Royall v. Virginia, 116 U. S. 572, 583, 29 L. ed. 735, 738.

"The intention (of the legislature to tax) being plain, the inartificiality of the law should not result in its overthrow."

Alaska Mex. Gold Min. Co. v. Terr. of Alaska (C. C. A.) 236 Fed. 64, 69—citing *Johnson v. So. Pac. Co.*, 196 U. S. 1, 49 L. ed. 363; *U. S. v. Stowell*, 133 U. S. 1, 33 L. ed. 555.

(A) The Word "Value" Means Gross Receipts.

Guided as above, we turn with a constructive mind to the ordinance definition of "gross income" as applied to the appellant. It is taxed upon the pursuit in the City of a *telephone and telegraph business* and the tax is measured by its income from that business in the City. Business, as commonly understood, whether it be merchandising, transportation, manufacturing or communication, connotes the making or transferring of property, or the furnishing of service, *for money*. The appellant's business is the rendering of communication service to the public for money. Now, while it may not be strictly accurate to speak of the "sale" of "service", since "sale" in its strict application means the transfer of property for money

or the promise thereof, yet it is popularly used in connection with the word "service"—"service" treated as a commodity upon the market as wheat or iron or automobiles. Not only has service been popularly so treated but it has also been judicially so regarded. In *McKinley Telephone Co. v. Cumberland Telephone Co.*, 152 Wis. 359, 140 N. W. 38, 40, it was held:

> "The furnishing of telephone service may be classed within the general terms of the (anti-trust) statute as the supplying of a commodity constituting a subject of commerce."

In *Postal Tel.-Cable Co. v. Tonopah & T. R. Co.*, 248 U. S. 471, 474, 63 L. ed. 365, 371, in construing the terms of an Act of Congress, a proviso in which excluded from the operation of the Act contracts or agreements between communications companies and common carriers for the exchange of services between them, Mr. Justice Holmes, speaking for the court, said:

> "But 'exchange' is *barter*, and carries with it no implication of reduction to money as a common denominator." (Italics ours)

If such services may be exchanged or bartered, they may, in the same sense, be sold.

It is quite plain that the City Council of the City of Seattle treated telephone and telegraph service, as well as service in general, as a commodity. This it was privileged to do even against the dictates of strict logic.

The only portion of the definition, therefore, with which the appellant is concerned is the following abridgment:

> "The value proceeding or accruing from the sale of (telegraph and telephone) service * * * without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

So, then, its tax is measured by the "value" proceeding or accruing to it from the sale of its service.

"Value" may, and sometimes does, mean "price". Price is a synonym.

> *Southeastern Exp. Co. v. Nightingale*, 33 Ga. 515, 126 S. E. 915.

"Value" is the first meaning ascribed to the word "price" in Webster's New International Dictionary (1931). From Funk and Wagnall's New Standard Dictionary of the English Language (1925), we learn that, in political economy, value, in a restricted sense, is market price. In The New Century Dictionary (1927) we find that value is the worth of a thing, measured by the amount of other things for which it can be exchanged, or as estimated in terms of a medium of exchange. George Crabb, in his "English Synonyms Explained", page 756, says that price is the measure of the value received from a sale; it is the measure of value or worth.

Mr. Justice Holmes, in *Int. Harv. Co. v. Ky.*, 234 U. S. 216, 222, 58 L. ed. 1284, 1287, defines value thus:

> "Value is the effect in exchange of the relative social desire for compared objects expressed

in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain." The "price", the "common denominator", received by the appellant is, therefore, the "value" which proceeds or accrues to it from the sale of its service. In its case the common denominator, the price, is fixed by law.

Under Rem. Rev. Stat. §10372, every telephone and telegraph company is required to file with the Washington Department of Public Works (the regulatory body) and to keep open to public inspection, "schedules showing the rates, tolls, rentals, contracts, and charges of such companies for messages, conversations and services rendered, and equipment and facilities supplied for messages and services to be performed within the State * * *."

The rates, tolls, etc. so fixed are subject to change by action of the Department upon its order after hearing upon its own motion or upon complaint (Rem. Rev. Stat., §10391). Telephone and telegraph companies are forbidden under penalty to charge, demand, collect or receive a greater or less or different compensation for any service rendered than the charge applicable to such service as specified in its schedule on file, or as changed by the Department (*Idem* §§10376, 10443, 10444).

The result is that the value proceeding or accruing to the appellant from the sale or rendition of its service is the ascertained or fixed rate or price which it receives from the subscribers. The value of its service is well defined by law.

But it is objected that the word "value" is unde-

fined and is the most intensely undefined word in the English language; that it may mean either gross receipts or net receipts; that it must mean net receipts because no value accrues to the seller of service or property except net profits. True, the word standing alone is susceptible of several meanings, but these meanings are generally resolved to one by the context or connection in which used. Mr. Justice Holmes, speaking for the Court, beautifully expressed the thought, thus:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."
>
> *Towne v. Eisner*, 245 U. S. 418, 425, 62 L. ed. 372, 376.

Value's circumstance here is its use in a revenue ordinance which obviously seeks to measure the tax by so much of total receipts as may be reached. The term "gross income", itself, connotes gross receipts, not net receipts. "Value" is also used in intimate relation with the word "sale".

When a furniture dealer sells a desk for $10.00, that amount is the value which accrues to him from the sale, regardless of the cost of the desk. When he purchased the desk from the manufacturer for $5.00, he parted with that value or amount. When he sold it, he recovered the value or amount given for it, plus a *net* profit or income. "Value" in the definition obviously comprehends value only from sale, not from *purchase and sale*. And so it is with service.

Aside from this, however, the taxpayer is told in no uncertain terms by the last portion of the definition that he may make no "deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses." It seems as plain as anything can be that "value" may not be construed as net profit or net receipts.

It is suggested, however, that the phrase just quoted does not in any way modify or relate back to the first clause in the definition—that it modifies or relates only to that portion commencing with the words "receipts by reason of the investment of capital." Lewis' Sutherland, Statutory Construction (2d ed., Sec. 420) is relied upon (Br. p. 9). That authority, in the same section, after stating that "relative and qualifying words and phrases, grammatically and legally, *where no contrary intention appears*, refer solely to the last antecedent," says:

> "* * * This principle is of no great force; it is only operative when there is nothing in the statute indicating that the relative word or qualifying provision is intended to have a different effect. And very slight indication of legislative purpose or a parity of reason, or the natural and common-sense reading of the statute, may overturn it and give it a more comprehensive application. Thus, as was said by the court in *Great Western Railway Company v. Swindon*, referring to the phrase 'horses, oxen, pigs and sheep, *from whatever country they come*,' the

> last clause would apply alike to all these animals and not alone to sheep, (citing Gyger's Estate, 65 Pa. St. 311). * * * Qualifying words have been applied to several preceding sections where the nature of the provisions and the obvious sense required it."

The effect of qualifying words or provisos was not limited to the last antecedent in *Austin v. U. S.*, 155 U. S. 417, 431, 432, 39 L. ed. 206, 211, 212, and in *U. S. v. Downing & Co.* (C. C. A.) 146 Fed. 56.

What is the intent of the City Council in the use of the concluding phrase? In the first place, it appears in an occupation tax act, the kind of act in which it is usual to employ *gross* income or *gross* receipts without deductions, as the tax measure. "* * * the manifest purpose is to reach all sales and secure a certain percentage thereof, — a method commonly pursued in respect of license and occupation taxes." *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 299, 59 L. ed. 234, 237. In the second place, it would be farcical to restrict the first clause to *net* receipts and by the next following language include receipts, rentals, royalties, fees or other emoluments, however designated, without *any deductions*. In the third place, the phrase is introduced by the word *"and"* which is not necessary if intended to relate only to receipts from the investment of capital, rentals, etc., the next antecedent.

It should be apparent at this point that the abridgment of the definition just considered is, as applied to appellant, "plainly, and clearly, and not cunningly and darkly penned." It designates as gross income

all of appellant's receipts from the sale of telephone and telegraph service, without deductions.

Moreover, beyond so-called telephone rentals for exchange service, *emoluments* designated as "tolls" for telephone toll service, "*fees*" for telegraph messenger service, and *receipts*, compensation, or *emoluments* for transmission of telegrams, it is not shown in the complaint, nor is it a matter of common knowledge capable of judicial notice that appellant is the recipient of receipts, compensation or reward for any other service or activity. *No fault is found with the inclusion in "receipts" of "rentals, royalties, fees or other emoluments, however designated."* As here used, "rentals" includes compensation for the use of personalty, since proceeds from the use of real property are excluded. That "rentals" is thus commonly used, see *Metropole Construction Co. v. Hartigan*, 83 N. J. L. 409, 85 Atl. 313; *Magoon v. Eastman*, 86 Vt. 261, 84 Atl. 869; and Webster's New International Dictionary (1931).

(B) Since Appellant's Gross Receipts are Otherwise Covered in the Definition, it may not be Heard to Complain of the Phrase "Receipts by Reason of the Investment of Capital." The Phrase is not Indefinite.

The rule, therefore, which precludes a litigant from invoking a constitutional objection to a part of a statute not applicable to his own particular case disqualifies appellant from raising any question concerning the use of the words "and receipts * * * by reason of the investment of capital."

Should we be mistaken in this however, and assuming that the said clause is, in some way not shown, relative to the appellant, we proceed with the discussion thereof. It serves the purposes of an omnibus and carries in its embrace all forms of receipts not otherwise mentioned or covered and, to that extent, is a second factor in gross income. It is not applicable, however, to all lines of business, such, for example, as obtain receipts only from sales. It is asserted that receipts are not obtained solely by reason of the investment of capital in the business but that receipts are the result, both of the investment of capital and of management, skill and labor, and that it is impossible to determine the relative amounts of the receipts obtained from each factor.

Capital is invested not only in inanimate materials and equipment but is also invested or employed in labor, skill and management. The appellant is a corporation. As such, it contributes to its business no human attributes such as skill and management. Its affairs are necessarily conducted by officers and employees. Its funds are invested or employed in the payment of compensation to these people, as well as in payment for plant and equipment. To the former purpose, a part of its so-called "working capital" is devoted.

Conceding, for the sake of argument, that capital is not invested or employed in both factors mentioned and that the Company's receipts are derived *solely* by reason of the investment of capital, yet the use of the words "investment of capital" does not exclude that portion of receipts attributable to skill and

management. To so hold would require that the definition be read as follows: "Receipts *solely* by reason of the investment of capital." In the appellant's case, skill and management without the investment or employment of capital would produce nothing.

The Seattle City Council is not alone in the use of this criticized phrase. In *State v. Central Trust Co.*, 106 Md. 268, 67 Atl. 267, the term "gross earnings", as used in a statute imposing a franchise tax on certain corporations, was construed to embrace all receipts "derived *from the use of its capital* in the transportation business." In a New York tax law, construed in *People v. Gaus*, 199 N. Y. 147, 92 N. E. 230, "gross earnings" was defined by the court "as all receipts *from the employment of capital* without any deduction." Also, in *People v. Sohmer*, 147 N. Y. S. 726, and *People v. Saxe*, 165 N. Y. S. 938, it was held that "gross earnings" "means all receipts *from the employment of capital* without deduction."

(C) Since all of Appellant's Receipts Accrue from the Sale of its Service, it Obtains no Receipts from the Use as Such of its Real Property. Any Indefiniteness in the Clause "Excluding Receipts or Proceeds from the Use * * * of Real Property" is, Therefore, not Before the Court. If Material, However, and Unconstitutionally Indefinite, the Clause May be Disregarded.

Exception is next taken to the parenthetical clause, excluding from receipts by reason of investment of capital in the business "the receipts or proceeds from

the *use* or sale of real property." The appellant would apply this matter as permitting it to deduct from its gross receipts the value of the use of its realty. With what warrant it seeks so to do, we know not. Certainly it obtains no such receipts or proceeds from its telephone and telegraph rate or toll payers. Receipts from that source are paid and received for telephone or telegraph service rendered, not for the use of realty. If any receipts are paid and received as compensation for the use of realty, the record is silent about it.

Again, if the appellant was the lessee of its realty, the rent in payment of the use of the realty would be one of its *costs* or *expenses* of operation. The use of the same realty under its own ownership does not transform the reasonable value thereof from an operating cost or charge to *receipts* for the use. Whether owned or leased, the value of the use, ascertainable or not, is a charge or expense in furnishing service, and as such, it may not, under the concluding portion of the definition, be deducted as a *receipt* from "*receipts*".

The exclusion of "receipts or proceeds" from the *use* of realty encompasses realty rents, and compensation, by whatever name, for easements of all kinds, and licenses in respect of realty. The obvious purpose is to avoid as much, and as practically, as possible the imposition of further tax burdens on real property in harmony with the popular will expressed in the adoption by the initiative method of an act limiting the taxation of such property to forty mills on the dollar

of assessed valuation thereof (Laws of Washington, 1933, Ch. 4).,

That the exemption was not intended to exclude what appellant pleases to call *receipts* from the use of its realty is implied from the failure to lay down in the ordinance any method of arriving at the value of the use of realty.

If the parenthetical matter: "(excluding receipts or proceeds from the use or sale of real property or any interest therein * * *)" is so vague, indefinite or uncertain that its meaning cannot be reasonably fathomed, it is of no avail to appellant, even though applicable to it. The exemption is of no controlling importance. If its retention means defeat for the whole ordinance, the main purpose — the collection of *presently vital revenues* — is thwarted. It is reasonable and proper, therefore, to proceed upon the assumption that the Council would have adopted the ordinance without the questioned exemption in view of the following provision:

> "Section 23. *Effect of Partial Invalidity*: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect." (R. 24)

Such a course is not without precedent.

In *Utah Pr. & Lt. Co. v. Pfost*, 286 U. S. 165, 76 L. ed. 1038, an Idaho statute imposing a privilege tax upon the generation for sale of electrical energy, measured by the amount of such energy produced for sale, contained a section exempting from the measure

of the tax so much energy as was sold for pumping water for irrigation purposes in the state, the consumer to receive the benefit of the exemption in the form of a credit on his bill. It was asserted that the exemption, because of the provision for credit to the consumer was void and carried to destruction the whole statute which without the exemption once failed of passage by the legislature. This Court, after calling attention to an included provision that an adjudication of invalidity of any provision should not affect the validity of the act as a whole, or of any provision or section thereof, said through Mr. Justice Sutherland (286 U. S. 185):

> "It fairly may be assumed that the Idaho legislature, in making this declaration, had in mind every provision of the act, including §5. The primary object of the statute under review, plainly, is to raise revenue. The exemption made by §5 and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity (citing *Marshall Field & Co. v. Clark*, 143 U. S. 649, 696, 697, 36

L. ed. 294, 311; *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 48, 60-63, 129 N. E. 202)."

See also

State v. St. Louis, 241 Mo. 231, 247, 145 S. W. 801;

Northwestern Mut. Life Ins. Co. v. Lewis & C. County, 28 Mont. 484, 72 Pac. 982;

State v. Santee, 111 Ia. 1, 82 N. W. 445.

Such is the effect of partial invalidity of an act or ordinance in Washington.

State ex rel. French v. Clausen, 107 Wash. 667, 182 Pac. 610;

Northern Cedar Co. v. French, 131 Wash. 394, 416, 417, 230 Pac. 837.

(D) The Penalty Provisions Apply Only to Intentional Wrong. In any Event, The Provisions Should not Render the Tax Provisions of the Ordinance Void.

Appellant is exercised over the penalties for disobedience, and states that it must *guess* at "gross income" at the risk of incurring heavy fine and imprisonment (Br. pp. 10,11). Undue alarm is expressed, for it appears in Section 22 of the ordinance that "It shall be unlawful * * * for any person to make any *false or fraudulent* application or return or any *false* statement or representation in, or in connection with, any such application or return, or to aid or abet another in any attempt to *evade* payment of the fee or tax, or any part thereof, * * * or to testify *falsely* upon any investigation of the correctness of a return,

or upon the hearing of any appeal, * * *" (R. 24). Mere mistake is not a violation. Under the rule of strict construction in favor of the accused in a criminal prosecution, there must be an intent to deceive, since the word "false" and the word "fraudulent" both imply intent.

State v. Case, 88 Wash. 664, 667, 153 Pac. 1070;

State v. Coolidge, 72 Wash. 42, 46, 129 Pac. 1088.

After all, the taxpayer ascertains and reports the amount of his own "gross income" (R. 20, Sec. 10). If any disagreement arises over the amount of the tax, or the amount or items of gross income, settlement of such differences may be had upon appeal to the City Council (R. 23, Sec. 19). *Plymouth Coal Co. v. Pa.*, 232 U. S. 531, 58 L. ed. 713. To a well intentioned taxpayer, the risk of incurring penalties is *nil.*

If this be not so, and it is determined that the definition is too vague to support a criminal penalty, and yet sufficient to afford a rule of conduct otherwise, the penalty should be stricken since the ultimate and sole object of the ordinance is revenue.

Utah Pr. & Lt. Co. v. Pfost, 286 U. S. 165, 185, 76 L. ed. 1038, 1048;

Marshall Field & Co. v. Clark, 143 U. S. 649, 696, 697, 36 L. ed. 294, 311;

People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 60-63, 129 N. E. 202;

State v. St. Louis, 241 Mo. 231, 145 S. W. 801;

N. W. Mutual L. Ins. Co. v. Lewis & Clark County, 28 Mont. 484, 72 Pac. 982;
State ex rel. French v. Clausen, 107 Wash. 667, 182 Pac. 610.

General Observations

For purposes of comparison, it is not amiss to invite attention to a few only of the many cases in which the use of words and phrases of more or less indefinite import have received judicial sanction:

A statute making criminal the grazing of sheep "upon any range usually occupied by any cattle grower". *Omaechevarria v. Idaho*, 246 U. S. 343, 62 L. ed. 763.

A statute requiring innkeepers in case of fire "to do all in their power to save such guests and inmates". *Miller v. Strahl*, 239 U. S. 426, 60 L. ed. 364.

An anti-trust statute denouncing contracts and arrangements "reasonably calculated" to fix and regulate prices, and acts which "tend to accomplish" the prohibited results. *Waters-Pierce Oil Co. v. Tex.*, 212 U. S. 86, 53 L. ed. 417.

The Act of July 2, 1890 (26 Stat. at L. 209, Chap. 647) denouncing contracts and combinations which by reason of intent or of the inherent nature of the contemplated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. *Nash v. U. S.*, 229 U. S. 373, 57 L. ed. 1232.

A Washington statute making criminal the publishing or distribution of printed matter tending to

encourage or advocate disrespect for law. *Fox v. Washington*, 236 U. S. 273, 59 L. ed. 573.

A criminal statute directed against a person who exposes meat for sale "and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements". *Hygrade Prov. Co. v. Sherman*, 266 U. S. 497, 69 L. ed. 402.

A criminal statute prohibiting the use of any vehicle or object "of such weight * * * as to destroy or permanently injure" the street, road or highway. *State v. Brown*, 108 Wash. 205, 182 Pac. 944.

A criminal syndicalism act containing "or which will tend to encourage disrespect for the law". *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211.

If courts should insist upon the absolute in the phrasing of revenue measures, we venture to say that neither the United States, the States, nor any other taxing unit could survive. Mr. Justice Sutherland remarked in the *Pfost* case, *supra* (286 U. S. 190, 191):

> "If, for example, absolute exactness of determination in respect of net income, deductions, valuation, losses, obsolescence, depreciation, etc., were required in cases arising under the federal income tax law, it is safe to say that the revenue from that source would be much curtailed. The law, which is said not to require impossibilities, must be satisfied, in many of its applications, with fair and reasonable approximations."

If, in considering constitutionality, all revenue measures were restricted to the nicety and preciseness

indicated by the Supreme Court of Texas as quoted at page 11 of appellant's brief, it would be interesting to speculate upon the fate of the Federal and State income tax laws.

CONCLUSION

We are filing briefs in related cases entitled *Puget Sound Power & Light Co. v. Seattle* (No. 344, October Term, 1933) and *Seattle Gas Co. v. Seattle* (No. 359, said term) involving the same or similar questions concerning Seattle Ordinance No. 62662. All will probably be heard together. If proper, we desire that the applicable arguments and authorities there presented be considered as made and presented here.

For the reasons there set forth, and urged herein, the judgment of the Supreme Court of Washington in this case should be affirmed.

Respectfully submitted,

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